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No. 97-4541

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

CPC INTERNATIONAL, INC., et al,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS

Atlantic Legal Foundation ("ALF") is a not-for-profit public interest legal foundation whose mandate includes the advocacy in the courts of principles of private enterprise and the mechanism of the market economy, limited government and opposition to burdensome regulation[1].

The appearance of Atlantic Legal Foundation as *amicus curiae* in this case is desirable to provide the Court with a public policy perspective that CERCLA should not be interpreted to vitiate the common law concept of limited liability where the statute and its legislative history do not evince an intent of Congress to depart from common law principles.

Atlantic Legal Foundation argues that the terms "operated" and "owned" as used in section 107(a)(2) of Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), and the term "owner or operation" as used in Section 101(20)(A)(ii) are tautological and unhelpful in determining the reach of CERCLA's imposition of liability, that the legislative history of CERCLA does not support the position of Petitioner, and that in light of the long and well-established common law concept of "piercing the corporate veil" which has informed

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not prepared, written, funded or produced, in whole or in part, by any person or entity other than *amicus curiae* or its counsel. CPC International, Inc. has for several years been a financial supporter of Atlantic Legal Foundation, but its contribution has amounted to less than 2.0 % of Atlantic Legal Foundation's annual budget. Clifford B. Storms, a member of the board of directors of Atlantic Legal Foundation, is a former senior vice-president and general counsel of CPC International, Inc.

and guided business decisions for decades, absent a clear intent of Congress to adopt a different standard, the courts should not construe CERCLA to eliminate the concept of limited liability for shareholders.

Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

The principal issue in this case is whether a corporate parent should be held liable as an "owner or operator" of a facility owned by a subsidiary only if the criteria for corporate law veil piercing under state law are met, or whether there is or should be a federal common law with looser standards.

The United States argues that CERCLA liability should extend beyond the language of the statute and should be far broader than state statutory and common law rules of corporate liability for acts of subsidiaries. The position of the United States is supported neither by the language of CERCLA nor by its legislative history. Indeed, when Congress intended to give "operator" or "owner" meanings broader than their common law usage, it used specific verbal formulae not used in the section of CERCLA here at issue. The rule of interpretation ALF advocates here is the presumption that Congress does not normally intend to displace state law by mere implication.

Those courts which have formulated a "federal common law" theory of pass-through liability have engaged in law making, not law interpreting. The plain language of the statute does not support the imposition of liability on parent corporations that do not in fact control the offending

facility. Neither is there any legislative history of CERCLA to support the notion that "person owning or operating" a facility includes persons who control or have the power to control (even is such power is not exercised) a related firm that is the actual owner and operator of the facility, if that control does not extend to the operation of the facility.

Corporation law with respect to preserving the independence of subsidiaries and the circumstances under which liability will be imposed on shareholders or related companies has been a traditional area of state legislation. Absent a clear conflict between federal statutory law or policy imperative and state corporation law, the federal courts should avoid creating a federal common law of corporate governance and liability absent unusual circumstances that do not here exist.

STATEMENT OF FACTS

ALF adopts the facts as stated by the United States Court of Appeals for the Sixth Circuit en banc in its opinion in *United States v. Cordova Chemical Co.*, reported at 113 F.3d 572.

ARGUMENT

I. THE LANGUAGE AND THE LEGISLATIVE HISTORY OF CERCLA DO NOT EVINCE ANY CONGRESSIONAL INTENT TO DISPLACE STATE CORPORATION LAW PRINCIPLES

A. The Statutory Language Provides No Guidance for Interpretation

"A rose is a rose is a rose is a rose."

Gertrude Stein, *Sacred Emily* (1913)

Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2), imposes liability on

> . . . any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . . .

Section 101(20)(A) of CERCLA, 42 U.S.C. § 101(20)(A) defines "owner or operator" as follows:

> The term "owner or operator" means . . . (ii) in the case of an onshore facility[2] . . . any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local

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[2] Such as the facility at issue in this case.

> government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand.

These statutory definitions are merely tautological and completely circular[3]. They provide no guidance for determining whether a shareholder or parent corporation is the "owner or operator" of a facility, title to which is held by a subsidiary and which facility is operated by the subsidiary.

If any meaning can be inferred from these definitional clauses, it is that when Congress intended to broaden exposure to liability, it chose the particular words "any person who owned, operated, or otherwise controlled activities at such facility," CERCLA §101(20)(A)(iii)(emphasis supplied) as it did in the language relating to liability of former owners in cases of bankruptcy and other involuntary transfers of ownership. That language is absent in the definition of "owner or operator."

The judiciary should not presume that Congress intended different verbal formulations in the same section of a statute to have the same meaning. *See Russello v. United States*, 464 U.S. 16, 23 (1983)

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[3] *See Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 156 (7th Cir. 1988).

B. The Legislative History of CERCLA Provides No Support for Petitioner's Position

The legislative history of CERCLA is notably sparse for a statutory scheme that has such far-reaching consequences. *See* Frank A. Grad, "A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability ("Superfund") Act of 1980, 8 COLUM. J. ENVTL. L. 1 (1982); *see also Wilshire Westwood Assoc. V. Atlantic Richfield Corp.*, 881 F.2d 801, 806-807 (9th Cir. 1989)(discussing CERCLA's legislative history) and we are aware of no part of the scant legislative history that sheds any light on the definitional problem; the United States has cited none. Indeed, one commentator has noted that "In 1980 a lame duck Congress hurriedly assembled and passed a bill that ultimately became law. Congress acted with very little discussion, under a suspension of the rules, with no allowance for amendments." Lois J. Schiffer[4] and Timothy J. Dowling, "Reflections on the Role of the Courts in Environmental Law," 27 ENVTL. L. 327, 333 (1997).

Other authorities have also attributed ambiguities or lacunae in CERCLA to the haste with which it was enacted. *See, e.g., United States v. Maryland Bank and Trust Co.*, 632 F.Supp. 573, 578 (D.MD.. 1986)("the structure of section 107(a) [of CERCLA], like so much of this hastily patched together compromise Act, is not a model of statutory clarity." *See also, United States v. Mottolo*, 605 F.Supp. 898, 902 (D.N.H. 1985)("CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions and

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[4] Now Assistant Attorney General in charge of the Environmental and Natural Resources Division of the Department of Justice and one of the counsel for the United States in this case.

an indefinite, if not contradictory, legislative history.")

There is no suggestion in the legislative history that Congress intended to override state law with respect to imposing liability on shareholders, including corporate "parents," and the United States cites none.

II. STATE COMMON LAW AND STATUTORY CRITERIA FOR HOLDING PARENTS LIABLE FOR ACTS AND LIABILITIES OF SUBSIDIARIES SERVE IMPORTANT SOCIAL AND ECONOMIC POLICIES

Limited liability is a fundamental tenet of corporate law and the economic foundation for marshaling capital and applying it to economically efficient goals. *See generally* Philip I. Blumberg, THE LAW OF CORPORATE GROUPS: TORT, CONTRACT, AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATIONS ("Blumberg") 1.01-1.05 (1987). Limited liability means that a shareholder will be held liable for the value of its investment in a corporation; it shields shareholders from claims of creditors that exceed the equity value of the shareholder's investment. This, in turn, makes it feasible for shareholders to invest in corporations they have no ability to manage or interest in managing, thus severing, in many cases, ownership from management; it enables investors to ignore the net worth and potential extraneous liabilities of fellow investors (who generally are anonymous).

Limited liability has acquired an important status in law because it is necessary to the functioning of a mature industrial economy capable of growing and distributing wealth by investing in ventures that are "risky," not so

much because of dangers to the environment or the health and safety of third parties, but from a perspective of financial analysis. *See* Blumberg at 4.02; William O. Douglas and Carol M. Shanks, "Insulation from Liability through Subsidiary Corporations," 39 YALE L. J. 193 (1929); Frank H. Easterbrook and Daniel R. Fischel, "Limited Liability and the Corporation," 52 U. CHI. L. REV. 89, 92, 97 (1985).[5]

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[5] Some commentators have asserted that corporations that are shareholders, and especially parent corporations that control wholly owned subsidiaries do not need the protection of limited liability because they are professionally managed and less risk averse than individual shareholders, or because they can more carefully weigh the potential benefits against the risks, or because their shareholders are already shielded by limited liability. *See, e.g.*, Blumberg 3.02.1 at 60; Frank Easterbrook and Daniel R. Fischel, "Corporate Control Transactions," 91 YALE L.J. 698 (1982); Henry Hansmann and Rainer Kraakman, "Toward Unlimited Shareholder Liability for Corporate Torts," 100 YALE L.J. 1879, 1882 (1991). Some commentators argue that while limited liability may be defensible in relations between a corporation and its "voluntary creditors" (e.g. persons who choose to do business with it and can assess the risks to it of its counterpart's limited liability), it is not warranted with respect to "involuntary creditors," including members of the public who are tort victims. We need not address that issue here; it is well settled in state law of corporations that the current law makes no such distinction, and it is not the function of the judicial branch to make new social policy. We submit, moreover, that the doctrine of "piercing the corporate veil" was developed to moderate the inequities that can arise from a too slavish invocation of lack of parent liability.

III. THE DEFINITION ADVANCED BY THE UNITED STATES IS UNTENABLE AND IMPRUDENT

> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means what I choose it to mean -- neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> The question is," said Humpty Dumpty, which is to be the master -- that's all."

Lewis Carroll, ALICE'S ADVENTURES IN WONDERLAND, ch. 6 (1865)

The United States advances an argument that pretends to take a "middle path" between the extreme position adopted by some circuits of imposing liability based on a parent company's capacity to control the subsidiary (but not specifically the offending facility)[6] and the traditional veil piercing test that requires a close connection between the parent and its subsidiary's acts[7].

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[6] Three circuits have adopted this "capacity to control approach at one time: *Kaiser Aluminum & Chem. Corp. v. Catellus Development Corp.*, 976 F.2d 1338, 1341-1342 (9th Cir. 1992); *Nurad Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir.), *cert. denied, Mumaw v. Nurad, Inc.*, 113 S.Ct. 377 (1992); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1051-1053 (2d Cir. 1985).

[7] Adopted by two circuits: *Joslyn Mfg.. v. T.L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108 (1991) and the Sixth Circuit in this case.

While the position of the United States is articulated so that it appears to be in accord with the plurality of circuits that have adopted an "actual control" of the subsidiary test[8], its position really is little more searching than the "capacity to control" approach. The United States, almost at the very end of its brief (Petitioner's Brief at 44), discloses its true position: it advocates the creation of a new federal common law of corporate parental liability which would hold a parent liable under CERCLA if the parent exercised any control over the subsidiary, other than that of a passive investor, regardless of whether the parent exercised any actual control over the offending facility. The United States suggests that if a parent corporation employs any of its "own agents"[9] "to manage the subsidiary," the parent would be liable as an operator. The test proposed by the United States ignores the plain meaning of the statute. To be liable as an operator, one must have "operated" the facility at which the waste was disposed of. The test advanced by the United States would focus on control by the parent over a subsidiary,rather than control over a particular facility[10].

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[8] *United States v. Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991); *Lansford-Coaldale Joint Water Authority v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993); *Schiavone v. Pearce*, 79 F.3d 248, 254 (2d Cir. 1996).

[9] The term "own agents" is not defined, but presumably means officers or managers employed by the parent who also perform some functions as employees of the subsidiary. It is not clear whether the United States would include "staff" positions, such as personnel of the accounting or law departments of the parent, or even the staff of a research lab owned by the parent, but which give advice to the subsidiary, or whether the test is limited to "line" personnel.

[10] A parent company might, for example, exercise some aspects of management control at the subsidiary's corporate headquarters, but exercise no such control "in the field." Likewise, the

In the last sentence of that same paragraph, the United States argues that the courts should make a factual inquiry whether the evidence demonstrates that the parent's "officers exercised control over the operations and management of the subsidiary's activities in a way that establishes that those officers actually participated in the operation of the subsidiary's facility."[11] These very contradictory or inconsistent tests articulated by the United States in this case exemplifies the difficulty in establishing a federal common law rule. The first articulation of the standard proposed by the United States incorrectly shifts the focus from the operation of the facility to participation by a parent in the overall management of its subsidiary[12]. The second articulation, while seeming not to embark on that deviation, would discourage parent corporations from vigilantly acting to advance the very purpose of CERCLA and related environmental statutes -- to prevent and, if necessary, quickly remediate, environmental hazards.

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parent might exercise operational control over one of a subsidiary's facilities, but not at the facility where waste was generated, discharged or stored.

[11] Again, the United States does not explain what criteria should be applied to determine whether an officer of the parent company who participated in some operations of the subsidiary "actually participated" in the operation of the subsidiary's [offending] facility."

[12] Such a definition would ensnare virtually all parent corporations, for very few simply acquire ownership without also exercising some oversight or control.

IV. SUBSTITUTION OF JUDICIALLY MADE FEDERAL COMMON LAW FOR WELL ESTABLISHED AND ARTICULATED STATE LAW IS UNWARRANTED IN THE ABSENCE OF CLEARLY EXPRESSED CONGRESSIONAL INTENT

It is unwarranted for this Court to infer from the circular definitions in CERCLA and the absence of expression of legislative intent that Congress had determined to upset the long accepted principles of corporate limited liability and to substitute a much broader concept of "control" as part of "federal common law." This Court has stated that only in "extraordinary cases judicial creation of a federal rule of decision is warranted" and such "cases. . . are 'few and restricted.'" *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 87, 89 (1994); *see also Atherton v. F.D.I.C.*, 117 S.Ct. 666, 670 (1997). Petitioner's invocation of the "remedial" nature of CERCLA and other policy arguments for expanding the net of responsibility simply do not meet the tests articulated in *O'Melveny* and in *Atherton*. There is no demonstrated need for national uniformity (indeed the split among the circuits indicates that the attempt to craft a federal common law has led to less uniformity and less predictability). *Compare, for example, U.S. v. Kayser-Roth Corp.*, 910 F.2d at 27 (1st Cir. 1990) *with Lansford-Coaldale Water Auth.. V. Tonolli*, 4 F.3d 1209, 1221 (3d Cir. 1993); *see Atherton*, 117 S.Ct. 666, 671.

This Court should not accept the invitation of the United States to embark on a "facile approach to federal-common-law-making" (*O'Melveny*, 512 U.S. at 89) which only articulates another fact-intensive inquiry while creating a federal rule no more satisfactory, and probably far less advantageous, than state law doctrines of corporate limited

liability and piercing the corporate veil that have been articulated and developed over almost two centuries to achieve purposes that are fundamentally important to our economic and justice systems -- creation of wealth, efficient markets, innovation and avoidance of injustice. The United States has not demonstrated that -- aside from losing this case -- the state law principles of corporate veil piercing are inadequate to effective enforcement of CERCLA as written.

The very fact that Petitioner seeks to have this Court make federal common law is a tacit admission, we submit, that Congress did not create a standard of "responsibility" in accord with the desires of the Petitioner. We also submit that the controversy about the correct interpretation of "owner or operator" as used in section 107(a)(ii) of CERCLA has been sufficiently notorious that if Congress desired to redefine or clarify the terms, it would have done so.

In this case, the concept of federal-common-law-making conflicts with the distinct functions of the legislative and judicial branches. Congress' silence does not indicate that federal courts should develop a federal "common law" rule, *O'Melveny*, 512 U.S. at 85, but rather indicates that, except in the "unusual" case, federal courts should either defer to a fully articulated body of state law or await Congressional action.

"The question is," indeed, "which is to be master." We submit, respectfully, that in this matter Congress -- not Petitioner and not the judiciary -- is master and should be so recognized.

CONCLUSION

The judgment of the court of appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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February 1998

CERTIFICATE OF SERVICE

Martin S. Kaufman, a member of the bar of this Court, hereby certifies that three copies of the within brief of amicus curiae Atlantic Legal Foundation was served upon counsel for each of the parties indicated below, at the addresses indicated, by Express Mail, postage prepaid, on February 19, 1998:

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